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D I S S E R T A T I O N

ON THE

J U D I C I A L C U S T O M S

OF THE

S A X O N A N D N O R M A N A G E.

By JAMES IBBETSON, Esq.
BARRISTER AT LAW.

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DISSEMINATION

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BY JAMES L. BERTON
REGISTERED AT LAW

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SECT. I.

IN the ninth century, and under the stupendous empire of Charlemagne, the Roman of the Augustan age would have surveyed with astonishment the uncouth arms, the irregular militia, the desolated cities, and the embattled castles of the petty proprietor of a feudal principality; he would have justly derided the absurdities of the judicial combat; and have haughtily contemned the obsequious homage of the Knight to the disdainful Lady of his affections.

The Warrior despised elegance and was unacquainted with luxury, but he was the slave of pompous ceremony. The Lover evinced the ardour of his passion by a modest reserve and timid assiduities. The destroyers of the repositories of learning were generous and humane. The defacers of the monuments of art were affable and courteous.

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This wonderful change in the opinions and manners of mankind was effected in some instances by the natural prevalence of the Northern manners, and in others by their gradual though rapid coalescence with those of the Romans. When the ancient possessors of Gaul and Italy were re-animated with the military spirit, the code of Theodosius was willingly exchanged for vague capitularies (1), and the uniform decrees of justice for the fortuitous decision of the sword. When the native severity of the conquerors was relaxed by a voluptuous climate, the splendid ornaments of the amphitheatre were easily transferred to the decoration of the lists, (2) the love of war and of warlike magnificence became the characteristic of one mighty nation.

Researches into customs and institutions of so novel and peculiar a nature are always instructive and often entertaining. But in an age of literary refinement we shrink with horror and disgust from legendary eloquence and monkish compilations; accustomed to the purity of Cicero we stigmatize the language of our ancestors as bald and dissonant; initiated in the Roman jurisprudence we involve their laws in a single term of indiscriminate reproach.

The *Gothic* taste of the author has nevertheless induced him to attempt an investigation of a few of the leading customs of the feudal æra, as they subsisted under the Saxon and Norman monarchies. It is with diffidence that he assumes so arduous a task; in the prosecution of it (as he possesses the requisites of leisure and opportunity) he intends to deduce the current from
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the spring, without confiding in the inaccuracy of translators, or the still grosser fallacies of second-hand quotations.

Though the general similitude between the various German tribes that settled in the Roman provinces was great and striking, yet they were possessed of particular usages of a distinct and independent nature. These usages they established in their respective districts, and from them originated the Municipal Constitutions of the kingdoms and provinces of Europe (3). Throughout the extensive dominion of France the Salian and Ripuarian Frank, the Burgundian, the Visigoth and the Roman were judged by their own peculiar ordinances (4). In England the law was not indeed of so transitory a nature, it was confined to the country of its adherents; in the dominion of the Angles the Mercian customs prevailed, in that of the Danes the Danish, and throughout the remainder of the kingdom the West-saxon (5).

To intimidate others from the commission of crimes by the infliction of penalties upon those who have offended is the just and philosophical idea of punishment. But to argue from their passions has ever been the fate of barbarous and illiterate nations. The law of retaliation was eagerly adopted in the despotic regions of the East (6); its manifold absurdities were veiled beneath the plausible appearance of rigid and discriminative justice; whilst the spirit of revenge which it breathed was highly grateful to a susceptible and implacable people.

Nor was the German notion of punishment much more correct. Crimes of the blackest dye were ranked with those of a
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less malignant nature, and considered in the light of civil injuries. When a man was murdered, the value of his life was exactly ascertained, his father or his children received it, and the law was satisfied. If a virgin was deflowered, she was recompensed, and the ravisher punished by a pecuniary mulct. The robber restored the value of the property in question. Something may perhaps be said in favour of the latter regulation, but nothing surely can be more ridiculous, than to appreciate the human life and fix an equivalent for virgin chastity.

This custom was of a very ancient date, it had been adopted by the Germans in a state of paganism and barbarity (7); it was continued by them when they became the converts of Christianity, and of a social life: by a perversion of the divine attribute of mercy, they totally excluded justice; we are told by the law of the Boii, "That men are prohibited by the fear of God " from punishing offences with death" (8). In this sentiment the various tribes concurred; their ancient constitutions consist of little more than a long enumeration of crimes, with their several compensations precisely defined, according to the rank of the person injured, and the comparative guilt of the offender (9).

But before we take a nearer view of this species of punishment, it will be necessary to form some idea of the tribunal before which the criminal appeared, of the judges who presided in it, and of the mode of proof that they admitted.

No one by the Saxon law had any authority over a king's Thain (10) or Tenant in Capite but the king himself; (11) the Thains

Thains had also an extensive and peculiar jurisdiction over their rear vassals the inferior Thains (12). The Freeman (13) were judged in the several courts of the Capitalis Friborgus, the Centenarius, the Gerefa of the Thrihing, and the Eorl or Ealdorman (14). These several officers were independent of the feudal constitution, those whom they judged were equally free with themselves; the causes of small importance were heard by the Friborgus, and so on in a regular progressive course, but the first decision was final; there was no appeal in the last resort from the inferior courts to that of the Ealdorman (15). By the celebrated regulation attributed to the excellent Alfred (16), all the Freeman of the realm were associated in small bodies, each consisting of ten persons; who were mutually bound by the tie of an oath to inspect into the conduct, and to answer for the crimes of the respective members of their community; the possessor of Allodial lands was produced or accounted for by the rest of the Friborg in the hundred court (17); the inferior Thain appeared with his fellows in the hall of his Lord (18); whilst the king's Thains were under a general obligation to support the innocent of their body and to secure the guilty (19).

Servants, who though not absolutely bondmen, were yet deficient in the qualifications annexed to good and legal men, were considered as under the proper controul and guardianship of their masters, whose duty it was to produce them, when required, in the court of the Thain or the Centenarius (20).

When the delinquent absconded a strict search was made for the space of thirty days, and if it proved ineffectual, the chief of

the Friborg and two other Freeman, accompanied by nine Compurgators, appeared in court, and purged himself and his Friborg from any participation in the crime on the flight of the offender: if there was a deficiency of Compurgators, the customary mulct, which frequently amounted to the *æstimatio capitis*, was levied upon the neighbourhood, with the greatest strictness, and in its fullest extent (21). The decision by negative proofs was allowed by the barbarian laws; it is said to be derived from the Mosaic dispensation (22); be that as it may, it was undoubtedly a most preposterous mode of ascertaining the right, or rather a certain method of confounding it. By the law of the Saxons, if a king's Thain was accused of a crime, he appeared with twelve of his peers, and solemnly asserted his innocence, whilst his companions expressed a thorough conviction of the truth of the declaration: the person accused was absolved by their friendly intervention, and the positive testimony of his accusers was disregarded as frivolous, or reprobated as calumnious (23).

The inferior Thain was intitled to the same privilege, except that a king's Thain was added to the usual number of his peers to increase their weight, and to give a sanction to their declaration (24). We do not find, that the strict right of purgation was extended to the *Allodiarum*; it seems to have been confined to the Feudal Tenants. The Compurgators, it is evident, composed a kind of negative jury; they formed their judgment not from evidence adduced in support of the prosecution, or from particular circumstances arising in favour of the accused,

but from the general tenour of his conduct; they concluded that a man who had never been convicted of committing an atrocious crime was incapable of committing one, and of adding the aggravation of perjury; a mode of reasoning too fallacious to be seriously confuted; but thus it was that they argued: when they acted with integrity, how often must they have been biaſſed by prejudice, and directed by a culpable partiality towards their diſtreſſed (though guilty) brethren!

When the fact was notorious, if a murder (for example) had been perpetrated by a Thain in the miſt of his fellows, he was liable to the payment of the Weregild without farther proceſs. When the character of the accused was too infamous to procure Compurgators, he was obliged to ſubmit to the infallible deciſion of the Ordeal. As the right of purgation by oath extended not to the Allodiarii, it is probable that every accusation was decided in their courts by the ſame cruel experiment: but this was a grievance of too intolerable a nature, and a remedy was provided by the lenient hand of the indulgent Alfred; in every hundred court a jury of twelve men was ſworn and inveſted with full authority to acquit and condemn (25): it was before this tribunal that common matters were determined and ordinary offences diſcuſſed; whiſt thoſe of greater importance and of a deeper dye were piously referred to the particular interpoſition of Providence (26).

This appears to be the true diſtinction between the Compurgators and the Jury, the firſt were admitted as negative, but
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conclusive evidence in the feudal courts, the last decided as judges in the allodial assemblies. They have frequently been confounded with each other and with the Pares of the French law ; but the Pares were in fact the Jury of the court of the Antrustio ; whereas the Saxon Thain presided by himself, and had no assessors. An independent Jury of twelve *Freemen*, who determined definitively in the *allodial* district, was unheard of upon the continent (27). The Jury in France was a creature of the Feudal constitution, and expired with its parent ; the Jury in England was totally unconnected with the fiefs, it was the offspring of justice and of mercy, and will continue to flourish, whilst they continue to be venerated (28).

The forms of purgation by fire and water have been amply illustrated, and are generally known : there are a few observations however which naturally arise from the subject, and elucidate in some measure the miraculous manifestations of innocence attested by the Saxon historians ; whilst they confine the Ordeal within the narrow limits which, it is probable, it never exceeded.

The trial by Ordeal was variously conducted according to the rank and condition of the criminal: if he was a Thain or Freeman, he demonstrated his innocence by handling red-hot iron with impunity ; by marking the intervals of the nine glowing plow-shares hoodwinked and unshod ; or finally upon extraordinary occasions by *swallowing* the consecrated bread received from the hands of the Priest with the bitterest and the most solemn imprecations (29). If he was a villain he was directed to
plunge

plunge his arm into a cauldron of boiling water, or was bound hand and foot and thrown into the nearest pool; and if he floated on the surface or was scalded, he was condemned (30).

The ceremony in every instance was rendered more interesting and solemn, by the celebration of Mass, and the devout recital of the form of prayer composed for the occasion (31).

But when a Freeman was accused of a misdemeanor, he appealed, in many instances, to the voice of his peers (32). The Thain had the privilege of clearing himself by the oath of his Compurgators; and, if his character was not totally corrupt, it was here that the accusation ceased (33). Even after the denunciation of the Ordeal, it was still in his power to redeem himself from the ignominious torture, by the payment of the composition annexed to the offence; which we may reasonably presume was the mode that was generally adopted by the noble and the opulent, in preference to a shameful and hazardous contingency.

But should we suppose that Queen Emma, however strong the suspicion, was guiltless in reality of the scandalous imputation of incontinency; was it impossible for this innocence to be manifested by the favour of the executioner, or the collusion of the attendant Priests; by the transparency of the bandage with which her eyes appeared to be obscured, or the coldness of the iron over which she trod (34)? Should we suppose that Godwin was stained in effect with the blood of Alfred, might not the agitation of a guilty and superstitious mind have occasioned a

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bodily obstruction, might not the horrors of detection have prevented a renovation of the faculties, and might not death have been the inevitable and almost instantaneous consequence (35)?

The Villein indeed was more obnoxious to the assaults of boiling water (36); but the hands of an hind inured to labour were able to endure a considerable degree of heat (37), the scald was generally superficial; whilst the effect of chance was easily converted into the decision of Providence, by the slightest negligence in the preparation of the water.

The test of immersion was usually confined to females of an inferior rank, nor was it impossible for the miracle which convicted the patient to have been sometimes produced by an emaciated body, or a peculiar fullness of garments.

From what has been said, we may fairly conclude that the Ordeal was by no means the general mode of trial prescribed by the Saxon constitution, that it was absurd in its principle, fallacious in its effects, and cruel in its process; for the experiment was repeated according to the magnitude of the offence, nor was it, in some instances, till after the third essay that the accused was convicted or exculpated (38).

When the culprit was pronounced guilty, the judges proceeded to ascertain the amount of the Weregild; this was determined by the rank of the person injured, and was paid by the prisoner or his frieborg to the complainant or his kindred (39): a certain sum was also claimed by the judge of the accuser, if his allegation

was refuted; of the accused, if he was convicted; this in the French law was called the Fredum, and by the Saxons Bota: it was considered by the Lord as a compensation for the violated peace, and in some instances for the loss of his vassal (40).

The Compositions and the Freda (41) upon the Continent were limited with precision in several distinct ordinances, which however by the inveteracy of custom were frequently infringed (42): in England the Weregild and the Manbote were as particularly determined, and more regularly exacted; the Weregild was increased in proportion to the rank and wealth of the deceased (43), the Manbote according to the dignity of the Lord (44).

It was of these judicial perquisites that the revenues of the king and of his great vassals were principally composed, and hence it followed that the right of criminal jurisdiction was esteemed by the Lord to be a very valuable Franchise, and was generally granted as a reward, with other immunities of a more certain but less lucrative nature (45).

The Weregild was originally considered as the redemption of the life of the criminal from the just indignation of the law; but from its being invariably paid it was soon reduced to a simple and regular amercement. In two instances alone do we meet with capital punishments unavoidable and incommutable; when the Vassal conspired against his Lord (46); or when he deserted him in the day of battle (47); so strong was the martial tie between the chief and his Comes, which had been knit by the Germans
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in their forests, and was closely and artificially entwined by the experienced hands of their more enlightened posterity (48).

It was directed by an excellent Saxon law, that all sales of living or dead commodities should be concluded in the presence of four witnesses (49): the prevention of thefts and the apprehension of robbers were the primary benefits that resulted from this prudent regulation; but these were not the only good effects of which it was productive; by the necessary presence of four reputable persons at the making of every bargain, all disputes upon the nature and effect of simple contracts were in a great measure obviated, if not entirely removed.

When the litigated question was of an important and extensive nature, it was heard and determined in the Folcmote or County-court before the Eorl and the Bishop, and the collective body of the Freemen. The latter, in the earlier period of the Saxon jurisprudence, appear to have possessed and exercised an equal and undivided authority, something similar to that of the peers in the modern court of the Lord High Steward. They appear to have been in possession of a judicial capacity, which was afterwards confined, or rather delegated to twelve of their number, by the constitution of Edward the Confessor, enacted with the advice of his Nobles, and framed after the Model of the criminal tribunal of Ethelred (50).

Causes of small importance were generally determined in the Courts of the Thain and the Centenarius; in the former they were

were ascertained by the wager of law, in the latter by the decision of fire and water. But when the spirit of equity exerted its superiority, when the cause or the parties were worthy of the interposition of a Jury, that select and impartial body were directed in all their determinations by the laws and customs of the realm; nor were they permitted to depart from the express rule under the specious but dangerous pretence of a liberal and equitable construction (51). An idea which can never be sufficiently reprobated, as subversive of the government of law, the pride and the happiness of a free and sensible nation. The baneful ingredients may be mingled in the honied cup by the hand of science, and recommended by the persuasive soothing of eloquence; but the effects of the venom will be equally certain and equally deleterious.

Such was the Saxon mode of distributing justice, and such the punishments that were inflicted; but the first (at least in many instances) was unhappily altered, whilst the last were deservedly subverted by the martial superstition of the Norman conquerors.

S E C T. II.

IN perusing the history of the trial by combat we are presented with a train of heroes who were arrayed in arms of a new construction, who fought in a new manner, and acted upon new principles. A slight review of the origin of these variations may perhaps be admitted by way of illustration, though not absolutely required by the nature of the subject.

A Roman army was composed of mercenaries of every nation without distinction—The path of honour was open to all alike.—The hardy veteran relied with a just confidence upon the celebrity of his own achievements.—From the period that the task of collecting the revenues of the state was configned to the Equestrian Order, the Roman Cavalry ceased to be regarded, it was in the ranks of the legions that the young and the ambitious were inured to the perils and initiated in the science of war.

The defensive arms of the Roman legionaries were an helmet, a breast-plate, and a shield of large circumference; their weapons were the sword and the pilum; their evolutions were various, and their order, though freer and more flexible than the dense array of the Phalanx, was regular and well contrived.

The infantry of the Germans consisted principally of a naked and undisciplined rabble, who assailed the enemy with darts (52). The Nobility fought on horseback—when his strength was confirmed,

firmed, the noble youth was introduced into the assembly, and invested with the shield and the lance; these he received from the hands of one of the chiefs, or of his father; and the ceremony was considered as the consecration of the warrior to the profession of arms and to the service of his country (53).

The lance was a very different weapon from the Roman Pilum; the Pilum was short, with a long and maffy head; the lance exceeded it in length, but was lighter, and constructed with a thin and narrow but extremely sharp point (54). The Pilum was always emitted from the hand; the lance was generally retained and used in thrusting; as the knight was seldom provided with any other weapon, it would have been the extremity of rashness to have parted from it; it would have exposed him a certain victim to the sword of his antagonist. Helmets and coats of mail were rarely worn, the German trusted to his shield for his defence (55); it was diversified with gawdy colours and was his only ornament; to shake it in the face of the enemy was his pride, to lose it and survive the most indelible disgrace (56): coolness and circumspective valour were inculcated by the German custom, and it is worthy of observation, that an institution exactly similar in spirit and effect was established by the Spartan Legislator (57). Amongst a people who are enthusiasts in war, the effects of fear are less to be dreaded than the impetuous exertions of temerity (58). They found however by experience that their defensive armour was extremely defective; they supplied themselves with casques and breast-plates from the spoils of the vanquished; but the casques were open, as his shield was a sufficient

ficient defence for the face of the legionary; the shields of the Germans on the contrary, who fought on horseback, were necessarily small, and of consequence a great part of the body was exposed—they had recourse to compleat suits of steel, and to close helmets.

Here they were involved in another difficulty, when the Vizer of the Helmet was down, all personal distinction was at an end; but this confusion was prevented by a very obvious method; instead of the dawblings with which they had been before embellished without a meaning and without a form, the shields of the *nobility* were stained with discriminative symbols, which were assumed and appropriated by the respective bearers.

In a barbarous age, when the imitative arts were almost without a votary, these insignia were rude and plain; hence it comes to pass that a coat of arms is esteemed by the heralds to approach the nearest to perfection when it is simple, and to recede the farthest from it when it is complicated and elaborate. A cross, a fess, and a bend are the most honourable, because they are the most ancient.

When the German Knight advanced to the combat he was followed by a valiant and active youth, who traced his steps and assisted him upon an emergency (59). When a taste for pomp was introduced with the observance of warlike punctilio, it became the duty of the faithful attendant to give and to receive defiance in the name of his lord, and to bear his escutcheon in the

the field and the council till the trumpets sounded, or the Orators proceeded to the arbitration of the sword.

The German horses were not sufficiently managed to preserve a regular order, much less were they practised in the complex evolutions of the Romans (60); these their impetuous riders disdained; couching their lances they rushed upon the foe in a violent but disorderly career; it was not the reciprocal charge of two contending armies, but the separate conflict of the individuals that composed them; the mutual support that constitutes the strength of a firm and united battalion was incompatible with their desultory array—the warrior depended upon his own valour.

The Lance continued to be the favourite weapon of the Knight to the extinction of the spirit of chivalry; he continued to single out his foe, and the conflict of the champions was terrible.

“ But she against him on the shield did smite
 “ With so fierce fury and great puissance,
 “ That thro’ his three-square ’scutcheon piercing quite,
 “ And thro’ his mailed hanberk, by mischance
 “ The wicked steel thro’ his left side did glance,
 “ Him so transfixed she before her bore
 “ Behind his croup, the length of all her lance,
 “ Till sadly groaning on the sandy shore
 “ He tumbled on an heap, and wallowed in his gore.” (61)

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Lucan forbore (however great the temptation) to imitate his predecessors in the single combats which they so frequently and so emphatically describe; the Roman discipline did not admit of them; Cæsar and Pompey, Antony and Brutus contending in single opposition would have excited the ridicule of the wits, and have sharpened the fangs of the critics. Tasso, on the other hand, has been as liberal of his duels as even Homer himself; and it must be confessed that in the latter instance as well as in the former the *costume* has been minutely attended to, and accurately preserved.

Consecrated to chivalry by the delivery of the lance and target, and afterwards by the investiture of the sword and spurs, attended by his squire, accoutred in the proper habiliments, and armed with the peculiar weapons of his order, the Knight (62) appeared with the same independent spirit, and acted with the same gallant reliance upon his own courage in a battle, a tournament, or a duel.

To a duel he was frequently summoned by the voice of the judge as well as by the impulse of his injured honour; let us see the origin of this extraordinary regulation.

We have been long accustomed to consider the decisions of justice as abstract positions derived from the reason of the case, the letter of the law, or the evidence of facts; but the notions of the Feudists were of a very different nature; they were ardent in the pursuit of military fame, and attached to the exercise of arms;

arms; but they despised learning, and dreaded the event that called forth the exertion of their mental faculties. The Lord, when he retired to his castle from the fatigues or the amusements of war, was neither qualified nor inclined to enter into the discussion of intricate and contradictory customs (63); he threw away the balance but retained the sword; he decreed that the parties should determine the dispute in single combat; he concluded, and the conclusion was natural to the bigotted slave of superstition, that Heaven would benignly interpose, and invigorate the arm of innocent debility.

By this ingenious contrivance the Chieftain was relieved from the pain of thinking, and gratified with the din of arms; whilst he preserved his authority unshaken, and received his compensations undiminished.

It has been said that the trial by combat was the natural consequence of the law that established negative proofs (64); that in the reign of Otho the Second the Italian lords were shocked at the perjuries occasioned by the latter; that they reasoned deeply upon the subject, and fixed upon the decision of the sword as the best and most rational remedy (65). But might not the Lombards have imbibed the notion from the practice in France, where it was confessedly established in the reign of Lewis the Pious (66)? We are told, "that the Salic law did not admit the negative proof, and therefore did not allow the trial by combat, in consequence of which it fell into disuse (67);" but the Salic law was the most regarded in France, and perhaps the most extended
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in its operation : how happened it then to be subverted by the cure of a defect in the Ripuarian and Burgundian codes ? it was the warlike spirit that prevailed, nor was equity more stable than injustice (68).

The kingdom of the Franks was of a very different construction from that of the Saxons ; the Franks preserved to the Romans a share of their ancient property ; the Saxons exterminated the Britons, and drove them to their rocks and fastnesses ; in France the Frank was the Soldier, and the Roman the Husbandman ; in England the Victor tilled the earth they had subdued : the martial fire was kept alive among the Franks ; but it languished among the Saxons : the court of Charlemagne was adorned with chivalry ; the residence of Alfred was dignified by learning : what was the consequence ? Though the negative proof was established in its fullest extent, the trial by battle was disdained, nor was it known to the Saxons in Britain till the day of their subjection to Norman tyranny.

So early as the beginning of the sixth century the adjudication by battle was established in Burgundy by Gundebald, the first of its dukes that bowed to the Francic yoke ; and from thence it advanced into the various independent principalities of the Feudal world. It was in vain that the Ecclesiastics remonstrated against the continuance of this pernicious and iniquitous custom ; the pious emperor Lewis was deaf to the spirited representations of the sensible prelate Agobard (69).

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It was in the reign of Charlemagne and of his immediate successors that the combat was firmly rooted in France, in Italy and in Germany (70); it was applicable at first to criminal accusations, but it soon expanded, and comprized not only the more serious, but the less important objects of civil litigation (71); issue was joined by the lance or the baton upon an imparlance, or upon the decision of an interlocutory question (72); the judge descended from the bench, and vindicated his slighted authority upon the body of his contumacious vassal (73); jarring testimonies were reconciled in the same summary manner; nor was it till after these preliminary skirmishes that the principal champions were brought into the lists to prosecute their presumptuous appeal to the God of Battles.

When William the Norman had fixed himself upon the English throne, he introduced by degrees the military constitutions of his native country; he confirmed and extended the feudal establishment (74); he instituted the trial by combat (75). But it was with a slow and undermining hand that he subverted the bulwarks of Saxon liberty; he cajol'd his subjects at the moment that he oppressed them (76). When a man was accused of a crime he was indulged with the indiscriminate election of the Purgatory Oath, the Ordeal, and the Duel. If he fixed upon the latter he waged it in person or by his champion, as he was instigated by the ebullitions of valour, or restrained by the caution of pusillanimity (77).

Compositions were discountenanced in the reign of the Conqueror, though they were not expressly prohibited. Wanton

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and unprovoked assaults were punished with the utmost severity, whilst death was the retribution of the murderer (78). The earls Waltheof and Radulph who had conspired against the king were the primary examples of that unrelenting severity which has ever been assumed by our monarchs in cases of inert and unsuccessful rebellion; they suffered decollation to the astonishment and intimidation of their humbled brethren (79).

The trial by Ordeal was also in a very languishing state, though it seems to have been practised at the express command of William Rufus for the purposes of the basest extortion. Fifty of the most opulent of his English subjects who had been accused by the king of destroying his game (a grievous and almost inexpiable offence in the eyes of a tyrant and a sportsman) were condemned to the Purgation of fire; and, if we may believe the legend, they were rendered to their exulting friends uninjured and immaculate. But notwithstanding this miraculous event, the mode of adjudication continued to decline; and dwindled in the space of a century into utter and merited oblivion (80).

Compensations and the trial by jury were revived by Henry the First in his confirmation of the laws of Edward the Confessor (81); but the prevailing notions of the country were in direct opposition to these (as they were once esteemed) invaluable privileges; nor was the king's popularity abridged when he explicitly ordained that the traitor (82), the murderer (83), and the robber (84), should be hanged; or when he impliedly encouraged the military decision of civil and criminal disputes (85).

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The eleventh and the twelfth centuries may be justly esteemed the æra of intellectual darkness, and of its concomitants ferocity and superstition. The Roman learning had been long extinguished, the Grecian was confined within the walls of Constantinople, or the limits of its petty domain. Charles and Alfred were no more. A race of tyrants arose; the chase was their only amusement, and war their supreme felicity; they enacted the most rigorous laws for the preservation of the beasts of the forest, and lavished the lives of their subjects in the vainest and most chimerical pursuits. How horrible are the distresses of that country (exclaims a cotemporary historian) whose sovereign is the tender preserver of noxious animals, and the sanguinary destroyer of his people (86)!

As Gontran, king of France, was hunting on the banks of the Wolga, he perceived that a buffalo had been unlawfully destroyed; he was irritated at the prophanation of the royal and favourite game, and commanded the principal keeper of the forest to produce the offender or to answer for his crime. Reduced to this alarming dilemma, the keeper accused the chamberlain, and issue of battle was awarded. The champion of the chamberlain and the keeper were equally matched, they contended for the victory till they both expired—Mercy in this emergence would have inclined the scale of justice in favour of the criminal; but this was not the genius of the forest laws, or of the princes that enforced them: the chamberlain was stoned to death, and three human beings were sacrificed to the manes of a buffalo (87).

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The instances of injustice and absurdity in consequence of the judicial combat are not so frequent or so striking in the annals of England, as in those of France. Though the combat was extended in the former country to accusations of treason and appeals of felony, it was softened by the concurrent efficacy of the trial by Jury, which began to revive in the reigns of the first Edwards, and to flourish with more than pristine vigour (88).

By the common law, if treason had been committed beyond the seas, the charge was prosecuted in the court of the lord high constable; if within the realm, in parliament, or in the courts of criminal jurisdiction: the latter had also cognizance of appeals of felony, at the instigation of the injured party, and of his wife or heir—the trial in all these cases was either by battle or by verdict (89).

In civil litigations the custom was originally confined to the determination of the absolute property of a freehold in a writ of right; it was afterwards rendered still less extensive by the invention of the Grand Assize; a tribunal composed of four knights, and twelve esquires; advised and projected by Glanville, as a salutary alternative to the prevailing mode of trial; a partial though not an effectual remedy for a grievous, but, at that period, an incurable evil (90).

Upon an accusation of treason the lord high constable (91), after hearing the complaint of the appellant and the plea of the defendant, appointed the day of battle, assigned their weapons

to the combatants, and received pledges for their appearance at the appointed time in the proper array, and with the gallant demeanor of noble and honourable knights, or with the ruder weapons and the humbler deportment of good and legal men (92). They were also strictly enjoined to refrain from reciprocal reproaches, or assaults, and to prohibit their friends and adherents from the like transgressions during the awful interval between the judicial award and the actual commencement of the combat.

The lifts were prepared of a proper height and dimensions with convenient apertures ; the ground of the field was levelled ; and the Constable, attended by his proper officers, compelled order and preserved regularity. Upon the day of battle, when the King had ascended his chair of state, and the Constable and Marehall had taken their places at his feet, the pledges of the combatants were produced and detained as prisoners till they were emancipated by the appearance of their principals. At the arrival of the appellant at the eastern postern of the lifts, he was interrogated by the Constable with respect to his appellation, the cause of his approach, and the propriety of his arms ; and afterwards conducted with great solemnity and decorum to the tent that was prepared for his reception. The defendant was received in a similar manner at the western postern, he was questioned with the same precision, and accommodated with the same conveniences.

The Constable and the Marehall proceeded in the next place to examine into the quality, the form, and the number of their weapons, to prevent undue advantages and the infringement of

the law of arms. The contending parties (after the celebration of mass) attested upon oath the truth of their respective assertions; they also declared that they were unprovided with spells or charms of any description or composition, and that they confided in the justice of their cause, and not in the assistance of infernal agents; and lastly, they severally swore to exert their utmost abilities in support of their solemn and contradictory asseverations.

Silence was then proclaimed, and the spectators were prohibited from approaching within four feet of the lists; which were cleared of all persons except the Constable and Marshal, their deputies, and two knights clad in compleat armour, but without any offensive weapons, who appeared as the friends of the respective champions (93). The heralds and the pursuivants attended at a convenient distance; the combatants were then conducted into the lists, and expected the commands of the Constable, who three times reiterated with a distinct and sonorous voice "Let them join the battle in the name of God" (94).

During the combat they were not permitted to rest or to take any refreshment, but by the express direction of the King; and upon his interference the Constable was extremely accurate in his survey of their situation at the time of their desisting, that they might be placed in the same position at the renewal of the combat.

If the contest was concluded without a mortal blow by the recreancy of either of the parties, the arms of the culprit were

instantly stripped from his body and broken before his eyes; he was then drawn to the place of execution at his horse's heels, and hanged and quartered with every circumstance of obloquy and disgrace. It was lawful however in every instance for the King to stay the fight, and to assume the determination of the cause (95) by a civil adjudication (96).

In a combat awarded upon a civil action, the champions of the parties, whether knights or yeomen, were armed with the target and baton (97); whereas in France the latter were invariably the weapons of the villein, whilst the lance and the sword were as constantly wielded by the knight (98). It was in the year 1260, and in the reign of St. Lewis, that the trial by battle was abolished in the royal demesne of France, though it survived in the Baronial territories, till they were consolidated with that body of which they had formerly been the members (99). In England the right of real property may be decided in the field at this very day; but for the honour of our country we must observe, that though the legislature has denied its interference, reflexion and humanity have interposed; and if the lapse of two centuries without an example may be said to operate as an abrogation, the judicial combat may be accounted a non-existent in form as well as in reality (100).

As the Knight was liable to be called into the field in the midst of a profound peace, it behoved him to retain the habits of war, and to preserve that hardiness and agility which were so eminently required by his manner of fighting, and by the
nature

nature of his arms: it is from this necessity that we must derive the origin of tournaments (101), a species of the *Lusus Trojæ*, but of a more robust and violent nature: valour as well as skill was requisite, wounds and fractures were the ordinary consequences, and death itself the not unfrequent lot of the rash, the weak, and the unskilful (102). But it was by these adventurous preludes, that the knight was prepared for the exertions of valour and of prowess which history has confirmed, romance exaggerated, and poetry adorned. The exploits of Godfrey of Bullboign are equally surprizing in the grave recital of Matthew Paris, and in the animated flow of the Jerusalem: we must reflect however that Tasso was a poet, and Paris a monk, and that Godfrey was the hero of a poem and the leader of a crusade (103, 104).

When the manners of mankind were comparatively polished, the fury of the tournament abated, instead of a warlike exercise it became an elegant amusement, the running at the ring was introduced, and the contest of the combatants was restrained to the shivering of their lances (105); a Tournament became as innoxious as a *Mischianza*, and like the latter it was frequently a gawdy substitution of idle parade for actual alertness, of empty bravado for effectual enterprize (106).

When we peruse the constitutions of our ancestors that regard the judicial combat, we are presented with an heterogeneous mixture of prudent regulation and ridiculous precaution. In an appeal to heaven, when virtue assumed the steadiness of valour,
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and innocence the efficacy of strength, they dreaded the machinations of the infernal spirit, and the arts of his itinerant imps; they fought by the alliance of human foresight to invigorate the arm of omnipotence, to establish its particular decrees, and to render its justice effectual.

It is with mingled wonder and contempt that we reflect upon the various modes of superstition that have sprung from the womb of ignorance, and have been fostered by the policy of Rome. The Saxon confided in the infallible declaration of the holy water or the consecrated bread; the Norman was equally attached to the more manly criterion of the sword; they dwelt with enthusiastic pleasure on the legendary descriptions of iniquity detected and innocence triumphant; and if the Saxon produced his Emma, he was answered by the Norman with Gunhilda (107).

The impressions of prejudice are deeply engraven in the minds of men; though the finer strokes are effaced by the hand of time, the leading traits will still be predominant: a species of the Ordeal has been transmitted through many generations of the rude and the illiterate, and has exacted a ready obedience from the tumultuous disposition of the vulgar; it is to the barbarous test of witchcraft that I allude, in which the ignorant in general confide, which the brutal have frequently practised, which the judicial authority has not always condemned (108).

The laws of modern honour have been ingeniously and accurately deduced from the forms of the judicial combat (109):

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the modern duel is the consequence of those laws which have been so long and so firmly established by the consent of the European world; that we can never expect their abrogation but by the gentle interference of apostolic simplicity of speech and primitive rectitude of manners.

NOTES.

N O T E S.

S E C T. I.

(1) **T**HE laws that were made in France under the first and second race, in the assemblies of the lords and bishops, were called Capitularies. L'Espr. des L. 28. 9.

(2) The characters of the Visigoths, Lombards, and Burgundians altered considerably after their establishment in the Roman province. Id. 28. 1.

(3) The Scandinavian Goths had different laws in different districts. In the North they had the Frostatinge-lag, in the South the Gulatinge-lag. Ragenfonis Lex Frostonienfis ap. Runolph. Jon. The province of Dalecarlia had also its peculiar customs. Hicckes. Thes.

(4) L'Espr. des L. 28. 2. Marculf. Form. 1. 8. LL. Rip. tit. 31.

(5) LL. Cnut. 14. LL. Edw. Conf. 12. Myrcen-laga, Dan-laga, West-sæxna-laga: there is a ridiculous derivation of Myrcen-laga from Marcia a British queen; which is properly rejected by Spelman. Gloss. tit. Myrcen-laga. The law of the Jutes in Thanet was swallowed up by that of the West-saxons.

(6) Alcoran, &c.

(7) Tac. de Mor. Germ.

(8) LL. Boior. 1. 7.

(9) LL. Rip. 89. LL. Longobard. 2. 52. 9. Id. 1. 7. 15.

LL. Sal. 1. 2. 3. 4. 5. 6. 7. LL. Bavar. 2. 20. LL. Æthelb. LL. Loth. et Edr. LL. With. LL. Inæ. 21. et infra. LL. Ælfr. 40. et infra. LL. Æthelst. 1. &c. LL. Edm. 1. &c. LL. Cnut. 1. LL. Edw. Conf. 15.

(10) The appellations of the tenants in capite, however distinct, are all derived from some term expressive of the closeness of the connexion between them and the king, and of the fidelity which they owed him as their liege lord.

Cyninges Thegen, Regis Thainus originally signified the king's soldier in an emphatical sense, as the warrior in whom he more particularly confided.

Baro was derived from Vair. Goth. Wer Sax. and Bar and Baro Franc. Theotisc. Homo. The promise to be the *man* of the superior lord was the most essential part of the oath of fealty, and was understood as a declaration of obedience and fidelity. Baron in its original sense was also a forensic term in Normandy and England, and signified an husband. Hiccl. Th. r. 2. 92.

Drudo was derived from Truad Franc. Theotisc. and Treowad Sax. Fidelis. Id. 94.

Antrustio had the same original.

Vassallus from the Franc. Theot. Fads-scalc. Fidelis minister. Id. r. 2. 100.

(11) Thegen, Thegn, Thainus, Tainus, Thane, Thain, was the usual title of honour in England till the Norman conquest, and in Scotland till a later period. LL. Æthelr. Ed. Wilk. f. 118.

(12) LL. Edw. Conf. 21. 22. 23. 24. 25. 26. 28. The rear vassals were the knights who held of the tenant in capite or mesne lord; they were called in France Vavassores, Valvassores, Vavassours, a corruption or rather a diminutive of Vassi, Fiduciarii. Du Cange Gloss. tit. Vavass. The Saxon terms for a rear vassal were Medemra Thegna & Les Thegna, an inferior Thain. He was also stiled Theoden or Lord, in the same manner as the Vavassour or Knight of the Normans received the appellation of Dominus. LL. Cnut. 69. Gloss. ad. Spelm. Cod. tit. Thainus. Ind. Civ. Lon. Edit. in Æthelst.

And here perhaps it may not be amiss to observe, that the word *Theoden*, by the unaccountable misrepresentation of a learned and indefatigable writer, has been rendered *Servus*, *Rusticus*. *Theow* it is true may be so trans-

translated, but the proper signification of *Tbeeden* is *Dominus*. Somn. Dict. Chron. Sax. anno 974. Chron. Abing. Poet. ap. Wanl. Hicckel. Thef. vol. 3. 95.

Wilkins is guilty of the mistake in his edition of the Saxon laws. Jud. Civ. Lond.

(13) The freemen were those who were not attached to particular Lords by the feudal ties; or subject on the other hand to base and villain services. They were known in France by the name of the *Liberi*, and their territory by that of *Allodium*; from All Fr. Th. All; and Lod or Lood Cimbr. the produce of the land; so All-lood signified the absolute produce of the land, without any payment, render, or acknowledgment; the dominium directum as well as the dominium utile. Hicckel. Thef. 1. 2. 90. L'Espt. des L. 30. 17 and 18.

In England they received the appellation of *Coerls* or *Husbandmen* and *Socmen* or *Freemen*; and their land was called the *Folclande*.

(14) LL. Edw. Conf. 32. 33. 34. 35.

(15) Id. 32.

(16) Spelm. Gloss. tit. Friborg.

(17) LL. Edw. Conf. 15.

(18) LL. Æthelr. 1.

(19) Foed. Ælfr. and Guth. 3. It is probable that the custom originated from hence, which afterwards became general, of extending the jury upon the trial of a tenant in capite to the whole body of his peers, instead of confining it, as in common cases, to twelve or any other arbitrary number. In this instance all the Thains in the kingdom were answerable for the crimes of one of their brethren; and not a particular association of ten alone, which was the case with respect to the inferior Thains and Allodiarii.

(20) LL. Æthelr. 1.

(21) LL. Edw. Conf. 20.

(22) Blackst. Comm. 3. 342.

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(23) Foed.

- (23) *Fœd. Ælfr. & Guth.* 3.
- (24) *Id.*
- (25) *LL. Æthelr.* 3. *Ed. Lamb. Mirror*, c. 5. sect. 1. *de Ælfredo Rege.* *LL. Edw. Conf.* 1.
- (26) In the ordinances of the marches of Wales in the time of Æthelred, the juries are directed to be composed of six English and six Welch; this was the origin of the modern juries *de medietate linguæ.* *Conf. de mont. Wal. temp. Æthelr.*
- (27) The *Rathimburgi* and the jury of the count in France had no definitive right of judgment; they acted merely as directors of the Ordeal and the Combat, and as assessors of the *Freda* and *Compositions*: this appears to be the extent of the authority of the *Pares.*
- (28) The juries in the courts baron were introduced by the Normans.
- (29) See the account of the death of Godwin, *M. West. Glanv.* l. 14. c. 1. *Lamb. de Ord.*
- (30) *Gl. & Lamb. ubi supra.*
- (31) *Spelm. Gloss. tit. Ordale.* *Lamb. de Ord.*
- (32) *LL. Æthelr. Ed. Lamb. Mirror.* c. 5. sect. 1. *LL. Edw. Conf.* 1.
- (33) *Fœd. Ælfr. & Guth.* 3.
- (34) *Brompt.*
- (35) *M. West.*
- (36) The villein had no alternative.
- (37) *L'Espr. des L.* 28. 17.
- (38) *LL. Æthelst.* 7. 19. 21. 23. *Jud. Civ. Lon.* *LL. Edg.* 62. *LL. Edw. Conf.* 9. *Spelm. Gloss. tit. Ordale & Lada. Gloss. ad LL. Sax. Ed. Wilk. tit. Ordale.* *LL. Rip.* 31. 5. *LL. Hen.* 1. 64. 12. The trial by the cross seems not to have been established by the Saxons.
- (39) *LL. Inæ, &c.*
- (40) *LL. Edw. Conf.* 12. *LL. Æthelb.* 5. 13. *LL. Inæ. MSS.* ap. *Spelm.* 75. *Capit.* 1. 512. *Weregild solutio* or *redemptio hominis*, *Manbota compensatio hominis*; *Wita* seems to have been a mulct for slight offences,

offences, in opposition to Bota, which was appropriated to more serious crimes: Fytc-wite, for example, was the fine for engaging in an idle brawl, and Man-bote the compensation paid by a murderer.

(41) Fredum was derived from Fride, Fr. Th. Frythe Sax. signifying peace; by the payment of the fredum the lord's peace was purchased.

(42) L'Espr. des L. 28. 12.

(43) LL. Inæ, 70, &c.

(44) LL. Æthelb. 5. 13. Foed. Ælfr. & Guth. 2. LL. Sal. 44. 66.

74. LL. Rip. 2. 7.

(45) LL. Edw. Conf. de Sac. Soc. Thol. Theam, & Infangthefe.

(46) LL. Ælfr. 4.

(47) LL. Edw. Conf. 35.

(48) Tac. de Mor. Germ.

(49) LL. Cnut. 22. LL. Æthelr. 4.

(50) This appears to be the true state of the constitution of a Saxon jury in the determination of civil disputes. Various and contradictory are the opinions of Spelman, (Gloss. tit. Juratores & Affisa.) Hickes, (Thes. Ep. Dif. 1. i. v. 2. f. 34.) Dufresne, (Gloss. tom. 2. p. 167.) Glanville, (2. 10. 16.) Polydore Virgil, and many others upon this abstruse subject. I have compared them as illustrating the Saxon laws, but have been directed in my determination entirely by the latter, which are expressly in favour of the actual establishment of a jury of twelve men for the decision of civil causes in the reign of Edward the Confessor; though perhaps it differed from the modern tribunal in the mode of its election, and in the permanency of its jurisdiction. LL. Æthelr. 3. Conf. de mont. Wallice. LL. Edw. Conf. 56. & 1.

The jury was established in very early times in the different kingdoms of Scandinavia; it was called Nembda, Nominatio, because six of the jury were named by the plaintiff, and six by the defendant. Olai. Verelii in indice Goth.

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In the laws of the Visi-goths we find "that no servant, or one under the controul of another, could serve on a jury; that a juryman might be fined for not attending; that the jury was liable to an amercement upon an attain of false judgment; and that it was properly summoned from the district where the land lay:" it is unnecessary to point out the resemblance between these regulations and those that prevail in our own law. LL. V. Goth. Edit. Ol. Rudbeckii, ch. 2. 3. 6.

The origin of the Nembda is generally imputed by the most rational of the northern antiquaries to Waldemar king of Denmark and Norway in the twelfth; or, with great appearance of probability, to Regner Lod-brog in the ninth century. Resenii Notæ ad jus Aulicum Canuti. (Olaus Wormius, 85. Sax. Gram. Hist. Dan. c. 9.

Some there are who have deduced this custom from the ancient constitution of Troy, from whence, according to a well-known hypothesis, the great Woden is supposed to have emigrated, and to have carried its institutions into the delightful regions of the north, the seat of tranquillity and of the terrestrial paradise—but these are the dreams of prejudice and scientific romance. Rudbeckius ubi supra. Caroli Lundii *Συμπόσις*. Edda Island. Edit. Hafn.

"Hic Odinus principes quemadmodum in Troja constituit, duodecim prefectos statuens in Sigtunensi qui jus dicerent." Raims. Kringla, c. 2. (51) LL. Edw. Conf. 1. & 35.

SECT.

S E C T. II.

(52) **T** A C. de mor. Ger.;

(53) Id.

(54) We can discover no traces of the word *Framea*, which is given us by Tacitus as the German term for a lance, in any of the Teutonic dialects; it is possible that it was borrowed of their neighbours by the Germans who bordered upon Gaul, and was consequently of Celtic original. We are assured by Cæsar and Lucan that *Bardus* was the Gallic word for a Poet; and by Tacitus that it retained the same signification in Germany; and in honour to the accuracy of those illustrious writers, we may observe with pleasure, that at this day among the Britons, the undoubted progeny of the Celts, the appellation of a poet is *Bardd*; and that the ancient Goths had also their *Barda*, which is at present retained with little or no variation in most of the languages that are immediately derived from the Teutonic.

(55) Tac. de mor. Ger.

(56) Id.

(57) Pott. Ant. Græc.

(58) If the censure had been intended to stigmatize the coward, the sword would certainly have been comprehended with the shield.

(59) Tac. de mor. Ger.

(60) Id.

(61) Fairy Queen, b. 3. c. 4. The shield in the above quotation is stiled the "three-square 'scutcheon"; this expression illustrates what has been said respecting the unfitness of the German shields to defend the face; they slanted gradually from the base at the top, and ended in a point at the grasp. Their form was extremely convenient for the horseman, in the management of his reins; but very ill adapted to guard his face from the assaults of his antagonist; when he raised his arm for that purpose, he pre-

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sent a narrow slip of steel, scarcely wider than his wrist, as his security against the terrible impression of the Roman Pilum.

(62) Knight, Cnyhte, Sax.

(63) Form. Marculf. Præfatio. LL. Lomb. 2. 59. 3. 41. 6.

(64) L'Espr. des L. 28. 14. Dalrymp. F. Prop. 308.

(65) L'Espr. des L. 28. 18. LL. Lomb. 1. 2. tit. 55. 1. 34.

(66) L'Espr. des L. 28. 18.

(67) Id. 28. 19.

(68) LL. Sal. Pactus legis 76. The Salic law determined by hearing witnesses on both sides.

(69) Epist. Ep. Agob. apud Spelm. Gloss. The law Gombete, compiled by Gundebald was long in use among the Burgundians, as the Salic law was in France. Mezeray Hist. de Fr. 20.

(70) L'Espr. des L. 28. 19.

(71) Battle was joined at Orleans upon a demand of debt. Chart. Lewis the young.

(72) Beauminoir, c. 61. 312.

(73) Chart. Liou le Groffe.

(74) LL. Gulielm. Conq. 58.

(75) Id. 63.

(76) Id. 63.

(77) Id. 68. 69. 70.

(78) Huntingdon, 371.

(79) Mat. Paris, 9.

(80) Spelm. Cod. in Wilh. Ruf. apud Eadm. 48.

(81) LL. Hen. 1. 2.

(82) Id. 75.

(83) Id. 48. Spelm. Cod. in Hen. 1.

(84) LL. Hen. 1. 72.

(85) Chart. Hen. 1. an. 1108.

(86) Math. Paris, 12.

(87) Mezeray Hist. de Fr. 40.

(88) Brit.

- (88) Brit. 22. Mir. 2. 7. 3 Inst. 132. 2 Inst. 68. Id. 69.
- (89) Glanv. 14. 1. Bract. 3. 118. 119. Brit. 8. 29. Fleta 1. 21. Mir. 2. 11. Litt. 500. 3 Inst. 132.
- (90) Glanv. 2. 11. 21. F.N.B. 4.
- (91) Spelm. Gloss. tit. Camp.
- (92) The same form was observed in both instances.
- (93) From hence originated the modern custom of bringing seconds into the field, who soon deviated from the ancient punctilio, and not only appeared with arms, but exercised them upon each other; this barbarous custom seems at length to be happily abolished.
- (94) *Laissez les aller en le nomme de Dieu.*
- (95) Such was the interference of Richard II. in the famous combat between the dukes of Hereford and Norfolk.
- (96) *Constitutio Thomæ de Woodstoc Ducis Glocestriæ edita in tempore Richardi secundi, apud Spelm. Gloss. tit. Campus.* A spirit of equity and impartiality, and a nice observance of punctilio are prevalent through the whole of this authentic and curious document. We cannot help being surprized that in an age when the general notions of justice were so clear, the mode of ascertaining the right should be so absurdly precarious.
- The Marshall, who is frequently mentioned in the above ordinance, was an officer of high distinction, as may be gathered from the import of his name, which signified the great or principal servant of the king, from *mare*, *magnus*, & *scale*, *servus*. Fr. Theot. He was sent as ambassador in cases of peculiar importance: king Richard I. deputed his Marshall to the governor of Messina to desire provision for his army; in military affairs he was only inferior to the constable, and had his deputy or *seneschal* (from *finn*, *vicem*, & *scale*, *servus*) and his inferior officers the heralds and pursuivants. Matt. Paris 160.
- (97) Spelm. Gloss. tit. Campus.
- (98) L'Espr. des L. 28. 20.
- (99) Id. 28. 29.

(100) Spelm.

(100) Spelm. Gloss. tit. Campus.

(101) The tournaments were probably ingrafted by the Barbarians on the amphitheatrical amusements of the Romans.

(102) A foldier (says Matthew Paris) who had passed his life in the murder of the innocent, in rapine and in tournaments. Matt. Paris 218.

(103) You may find a full account in the above historian of the uncommon strength and valour of Godfrey of Bulloign and Robert the Norman. M. Paris 36. And the acts of Richard I. Id. 170 and 194.

(104) Gierusalemme, Cant. 20.

(105) In an. 1178, Henry the son of Henry II. held tournaments in France with running at the ring, and was frequently the victor. M. Paris 136. Id. 177.

When the barons were in possession of the city of London against king John, they amused themselves with a tournament. Id. 265.

(106) The Mischianza was a festival held at Philadelphia in the year 1778, and is pretty accurately described in the Dissertation.

(107) Rapin.

(108) The strange decisions of the several juries under the direction of Hale, upon the trials of the reputed witches in the last century, are well known; as is the more equitable determination of a Buckinghamshire jury in the present, in the case of some of the inhabitants of Tring in Hertfordshire.

(109) L'Espr. des L. 28. 20.

As the Salic laws are mentioned in the foregoing Dissertation in terms of respect, as institutions of a more reasonable and equitable contexture than the various Barbarian codes of that dark and superstitious age; I may perhaps be forgiven in my attempt to dispel the almost impenetrable darkness which has obscured their original.

The president, Montesquieu, has assumed, "that the houses of the ancient Germans were surrounded with a small inclosure," and he refers us to Tacitus. "Vicos locant, non in nostrum morem connexis & cohe-

“rentibus ædificiis; suam quisque domum spatio circumdat.” The interpretation of which seems to be this: “The houses of their towns are not connected like ours in a continued range of buildings; but are all surrounded with a void space.” By this construction we make the Historian consistent with himself, and with Cæsar, when they assert that the Germans had no inclosures, boundaries, or land-marks: Neque quisquam agri modum certum, aut fines proprios habet. (Cæsar. de bello Gal. Com.) I shall not attempt to follow the President in his attempt to prove, that this fancied inclosure descended to the sons alone; but shall confine myself to the consideration of his last assertion, that it received its appellation of the Salic land, or the land of the house, from Sala, that signified an house.

The word Sala it is presumed is of Teutonic origin, but it is in vain that we search for it in any of the Teutonic languages; Hus was the common term for an house in the Gothic, the Cimbric, and the Anglo-Saxon; Sala, it is true, may be discovered in the glossaries of the barbarous Latin; but its proper signification was an *Hall*; it was derived from the Gothic Alhs, the Cimbric Hal and Holl, the Franco-Theotiscan Sal, and the Saxon Healle; the English Hall is derived immediately from the Saxon; from Sal the Franks formed the Latin Sala, the French form Salle, the Italians Sàla, and the modern British Saloon.

The primitive signification of Alhs, Sal, and Healle, was the court of the prince, or the edifice in which the popular assemblies were convened; when the feudal lord was invested with the judicial power, the term was applied to the largest and principal apartment of his mansion, where the decisions of justice were pronounced, and the rights of hospitality maintained.

But antecedent to the departure of the Franks from Germany (and the Salic law originated before that period) the constitution of the feuds was unknown, the houses of the noble and the brave were constructed with mud and rushes; they were deficient in every convenience, and cannot be supposed to have contained a variety of rooms with separate denominations and distinct offices.

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Hence it follows, that Sal or Sala was never applied by the Franks to any distinct part of the house of a private individual, till after the introduction of the feuds; much less was it extended by the rhetorical figure of a simple and illiterate nation to the house itself.

If the Salic law had really been derived from Sala, it must have been confined to those peculiar constitutions which respected the land and house from whence it received its denomination. But this is not so much as surmised; the Salic code comprehended a vast variety of articles, it was received by the Franks together with the Ripuarian; and may be fairly considered as a written collection of the customs of the Salii, as the latter was of those of the Ripuarii.

Nor is it necessary to recur to these subtle refinements for the reason of the female incapacity in the succession to the crown of France; it is given us by the President himself, and is as satisfactory as it is ingenious. "Women (says he) succeeded neither to the Empire nor to France, because at the establishment of those monarchies, they were incapable of succeeding to fiefs; whereas in monarchies that were founded after the establishment of the perpetuity of the fiefs (as by the Normans in England) the heir-female was permitted to succeed (a)."

Hickes is of opinion that the Salic laws, in general, received their denomination from the courts of the kings and princes in which they were made; or rather (I presume) collected: but in this sense the Theodosian code and the book of the fiefs might with equal propriety receive a similar appellation (b).

Nothing perhaps is more puzzling in the perusal of feudal antiquities, than the distinction between the Lord of the Beneficiary, and the Governor of the Allodial Tenants. The chiefs of the counties, shires, and provinces, in particular, have been differently described in different ages and kingdoms; inasmuch that it is almost impossible to discover the same judicial officer disguised under a variety of terms, Cimbric, Francic, Saxon,

(a) L'Espr. des L. 31. 32.

(b) Hickes Thes. v. i. l. i. f. 97.

Latin,

Latin, German, French, and English. I shall endeavour to trace him however through all his changes.

When the Franks had established themselves in Gaul, they appointed a supreme governor in every province, with authority over all, whether Franks or Romans, who were *unconnected by the feudal tie*, whom they dignified with the title of *Graff*, a name in their language importing wisdom: this in the barbarous Latin of the times was rendered *Grafio*, but was afterwards changed, when the Franks had laid aside their primitive dialect, and had formed the modern French upon the ruins of the Latin: the *Grafio* assumed the appellation of *Comes*, which had been appropriated in the lower empire to a station of the first importance; it was melted however into the vernacular term *Count*, which has extended itself into Spain, Italy, and Britain, and even into Greece; where the *Korac* in the twelfth century was an officer of great dignity.

The Saxons, when they divided their acquisitions in Britain into shires, appointed a governor in each, whom they called *Gerefa*, a term of the same import with *Graff*; his authority was confined in like manner to the Socmen or Freemen. It is probable that his title of *Eorl* was introduced by the Danes at a very early period; it seems to be a corruption of the Cimbric *farl*, and became the usual appellation of the *Gerefa* under the Dano-Saxon government. As for *Ealdorman* it was a general name importing veneration and esteem, as the Roman senators were stiled *Patres*, the Saxon *Eorls* were considered as *Ealdormen*, non propter ætatem (says the law) sed propter sapientiam & dignitatem. But when the Normans had subverted the ancient constitution of the kingdom, the shires assumed the form of fiefs, in imitation of a similar revolution in France: the *Eorls* became feudal tenants, they received the name of the *Counts*, they asserted their prerogatives, and submitted to their services.

The name of *Count* however expired with the use of the Norman dialect, the ancient title of *Eorl* was resumed (with the alteration of a single letter) and continues as an honorary distinction, though the military services have been long since obsolete, and the civil jurisdiction confined

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to an officer who retains the distinguishing appellation of *Nice-comes* or deputy to the *Earl*.

Perhaps it is unnecessary to add that *Grave*, derived immediately from the *Francic Graff*, continues to be the appellation of a *Count* throughout the German empire.

Spelm. Gloss. tit. Eorla; Eorli

Wilk Gloss. tit. Eorl; Aldermannus.

Jun. Etym. Eorla.

LL. A. S. Jud. Civ. Lond. f. 70. Ed. Wilk.

Bede Sax. Transl. Elfr.

Sax. Chron. an. 938.

Cantacuzeni Historia, lib. i. c. 40.

Dict. Cimbr. Run. Jonæ. ap. Hickef. Thef. l. i. v. 2.

LL. Edw. Conf. 35.

Du Cange. Gloss.

The Saxons when they divided their acquisitions in Germany, appointed a Governor in each, whom they called *Geret*, a term of the same import with *Graf*; his authority was confined in like manner to the limits of his territory. It is probable that his title of *Earl* was introduced by the Danes at a very early period; it seems to be a corruption of the *Cimbrie Graf* and hence *D. N. E. A. T. H. E. N. D.* As for *Baldwin* it was a general name in the Saxon Empire and often, as the Roman Emperors were styled *Caesars*, the Saxon Emperors were styled *Baldwins*. But the name of *Baldwin* (the law) did not signify a distinction. The first attempt to alter the ancient constitution of the kingdom, the first attempt to introduce a similar revolution in France, the first attempt to alter the name of the Count, they altered the name of *Count* into *Baron*.

The name of *Count* was confined with the title of the Roman *Comes* to the ancient title of *Earl* was retained (with the addition of a high degree) and continued as an honorary distinction, though the military power has been long since obsolete, and the civil jurisdiction confined to the civil jurisdiction.

